(2)

No. 87 1981

In The
SUPREME COURT OF THE UNITED STATES
MAY TERM, 1988

CECIL G. HARRIS,

Petitioner

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

vs.

REFINERS TRANSPORT & TERMINAL CORPORATION, and

LOCAL UNION 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
and
WILLIAM LICHTENWALD,

Respondents.

APPENDIX ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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John G. Rust, Counsel for Petitioner, hereby certifies that he on May 31, 1988, served three (3) copies of the foregoing Appendix on Attorney Robert N. House, Attorney for Respondent Refiners Transport and Terminal Corp. and also three (3) copies on attorney Jeffrey Julius, attorney for Respondents Local 20, Teamsters, etc. and William Lichtenwald, by U.S. Mail, first class, postage paid.

Respectfully submitted,

John G. Rust

No. 86-3938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CECIL G. HARRIS,

Plaintiff-Appellant

v.

REFINERS TRANSPORT & TERMINAL CORPORATION LOCAL UNION NO. 20, INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; AND WILLIAM LICHTENWALD

Defendants-Appellees.

:Filed: Dec. 22, 1987

:ON APPEAL FROM THE UNITED STATES DISTRICT :COURT FOR THE NORTHERN DISTRICT OF OHIO

:

NOT RECOMMENDED FOR FULL-TEXT :PUBLICATION

Sixth Circuit :Rule 24 limits citation to specific sit-:uations. Please see Rule 24 before :citing in a proceedings in a court :in the Sixth Circuit. If cited, a copy :must be served on other parties and the Court. :This notice is to be prominently :displayed if this decision is reproduced.

App. P. 1

BEFORE: MARTIN, JONES and NORRIS, Circuit Judges.

PER CURIAM. In this case, plaintiff-appellant Cecil G. Harris contends that on or around January 10, 1984, he was wrongfully discharged by defendant-appellees Local Union 20, International Brotherhood of Teamsters (the Union), and business agent William Lichtenwald, were unfaithful in their representation of him during his hearing before the Ohio Joint State Grievance Committee. His original action, filed in the United States District Court for the Northern District of Ohio, was pursuant to § 301 of the Labor Management Act, 29 U.S.C. § 185 (1982) and § 202 of the Labor Management Reporting & Disclosure Act, 29 U.S.C. § 411 et. seq (1982). The case was dismissed by the district court in a ruling granting summary judgment to the defendants. Harris appealed to this court. Because we find

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no genuine issue of material fact, we affirm.

Refiners Transport and Terminal Corporation's business is to transport liquid chemicals by the means of tractor-trailer trucks. Plaintiff-appellant Harris, claims that he was fired from his truck driver's job with Refiners because he followed the federal government's safety requirements and his employer's written rules, and because he would not "cut safety corners" or work "for free" as other drivers did.

On January 5, 1984, in accordance with its collective bargaining agreement, Refiners held a pre-discharge meeting with Harris and Local No. 20 representative. At that meeting, Refiners reviewed Harris' work record and indicated that he had violated company rules twelve (12) times during the preceeding nine (9)

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months. Therefore, Refiners claims that Harris' discharge was justified and not violative of its collective bargaining agreement with the Union.

The next day Harris exercised his right under the collective bargaining agreement to file a written grievance protesting his dismissal. Since Refiners and Local No. 20 were unable to resolve the grievance, the **Union** sent Harris' grievance to the Ohio Joint State Grievance Committee (the Committee). A hearing was held on January 10, 1984, during which Refiners again reviewed Harris' work history and its reasons for dismissing him. Both the Union business representative, William Lichtenwald, and Harris gave reasons why Harris' dismissal ought not be upheld. After examining the evidence presented, the Committee deliberated and issued a majority decision sustaining Refiner's discharge of

Harris. Harris then appealed to federal district court.

Harris brought his federal court action pursuant to section 301 of the Labor Management Act, 29 U.S.C. § 185, and Title 1, section 202 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 et seq. District court jurisdiction was pursuant to 18 U.S.C. §§ 1331, 1337, and 29 U.S.C. § 185. Harris' claim arouse out of his discharge by Refiners and the Union's handling of his grievance. Refiners' motion for summary judgment was granted by the district court because Harris failed to show that either Refiners or Local No. 20 breached the collective Bargaining agreement by acting in a manner which was arbitrary, capricious, or in bad faith. This is the standard Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976) states an employee must meet in order

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to prevail in a section 301 action. Harris did not respond to the motion and judgment was entered against him on March 31, 1986.

On April 11, 1986, however, Harris filed a motion for a new trial and a motion to alter and amend judgment pursuant to Fed. R. Civ. P., 59. He also filed a motion to vacate the judgment pursuant to the "inherent power of this Court to reconsider and vacate." On April 30, 1986, he filed a motion for leave to amend his complaint and again moved the district court to vacate the judgment of March 31, 1986, pursuant to Fed. R. Civ. P 60 (b). Each motion was opposed by both defendants. In turn, Harris replied to a number of the defendants' oppositions and a notice of appeal was filed by him on April 30, 1986.

The district court found four motions before it: (1) a motion for

a new trial pursuant to Fed. R. Civ. P. 59 (a); (2) a motion to alter and amend the judgment pursuant to Fed. R. Civ. P. 59(e); (3) a motion to vacate the March 31, 1986 judgment pursuant to Fed. R. Civ. P. 60(b); and (4) a motion for leave of the Court to amend the complaint.

The district court held that a motion for a new trial subsequent to a summary judgment motion was technically improper, 6-Pt. 2 J. Moore, Moore's Federal Practice ¶ 56.26-1 (2d. ed 1987), and therefore found no merit in it. It also concluded that none of Harris' other allegations, even when judged in a light most favorable to him, established a genuine issue of material fact. Thus, the court denied all of Harris motions. Harris now appeals the district court's grant of summary judgment. For the reasons set forth below, we agree that summary judgment was appropriate.

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I.

In Glenway Industries, Inc. v. Wheelabrator-Frye, Inc., 686 F.2d 415 (6th Cir. 1982) (per curiam), we noted that a "court of appeals is mandated to apply the same test in passing upon an award of summary judgment as that utilized by the trial court to grant the motion." Id. at 417 (citing Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981)). It is the task of the district court to determine whether there are any genuine issues of material fact to be resolved without weighing the evidence. In deciding this it "must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant." Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962).

In essence, the district court must follow Fed. R. Civ. P. 56(e). In relevant part the Rule states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials . . . [of his] pleading,

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> but . . . (his) response, by affidavits or as otherwise provided in this rule, is a genuine issue for trial. If . . . (he) does not so respond, summary judgment, if appropriate, shall be entered against . . . (him).

Pursuant to Rule 56(e), once Refiners moved for summary judgment, Harris was obligated to demonstrate that the district court's grant of the motion would be improper. He must have shown either the existence of a material question of fact or that the underlying substantive law did not permit such a decision. Harris did neither. In fact, he did not respond to Refiner's motion. Thus, the district court was forced to rely on the complaint and other portions of the record in deciding whether the defendants were entitled to judgment as a matter of law. In so doing, it concluded that Harris failed to establish that either Refiners or the Union violated the collective bargaining agreement. This conclusion was based upon Harris'

failure to show that the action complained of was done capriciously, arbitrarily or in bad faith. Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976). We agree that Harris failed to make this showing and therefore affirm the grant of summary judgment for Refiners.

As for Harris' allegation of unfair representation by the Union, we also find this claim to be without merit. The Supreme Court has held that a breach of the duty of fair representation is found only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). We do not think that Harris meets the Vaca standard since the only support he provides for his allegations are his own answers to Refiners' interrogatories and request to produce documents. Thus, we

hold that the district court was correct in labeling those statements conclusory and unsupported. For this reason we conclude that the district court was correct in granting summary judgment for the Union. Accordingly, we AFFIRM the judgment of the district court.

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No. 86-3938

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL G. HARRIS Plaintiff-appellant, v. REFINERS TRANSPORT & TERMINAL CORPORATION, ET AL., Defendants-Appellees	FILED March 1, 1988 JOHN P. HEHMAN, Clerk O R D E R

BEFORE: MARTIN, JONES and NORRIS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated ot only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APP. P.13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CECIL G. HARRIS,	*	FILED: Mar. 31, 1986
Plaintiff,	*	No. C 84-7578
-vs-	*	OPINION
REFINERS TRANSPORT & TERMINAL CORP., et al.,	*	and ORDER
Defendants.	*	

* * * * *

WALINSKI, J.

This cause is before the Court on a motion for summary judgment filed by defendant Refiners Transport and Terminal Corporation. Plaintiff has filed no opposition. This action is brought pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S. C. §185, and Title I, §101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §411 et seq. Jurisdiction is predicated on 28 U.S.C. §§1331, 1337, and on 29 U.S.C. §185.

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This action arises out of defendant Refiners Transport and Terminal Corp.'s (hereinafter "Company") discharge of plaintiff Cecil G. Harris on or about January 10, 1984 and defendant Union's subsequent handling of a grievance filed by plaintiff protesting the discharge. On July 6, 1984, the plaintiff mishandled the grievance in breach of the duty of fair representation.

Defendant Company moves for summary judgment on three bases. First, defendant claims that plaintiff's §301 claims are barred by the statute of limitations applicable to such claims as set forth in the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Second, defendant contends that plaintiff's §301 allegations fail because plaintiff has not adequately alleged a breach of the union's duty of fair representation. Finally, defendant claims that §301 claim must fail

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because plaintiff has not alleged exhaustion of internal union remedies.

Fule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, the Court's function is to determine if any genuine issue exists, if such an issue exists. United States v. Diebold, Inc., 369 U.S. 654 (1962); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193 (6th Cir. 1974). Further, "(i)n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for theparty opposing the motion and against the movant." Bohn

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Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). To summarize, if the movant demonstrates that he is entitled to a judgment as a matter of law, then the Court must next weigh the evidence in a light most favorable for the party opposing the motion; if reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Rule 56(e) places a responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations

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> or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

Plaintiff did not respond to defendant's motion in the instant case, and thus the Court was constrained to rely on the complaint and other portions of the record in determining that defendants are entitled to judgment as a matter of law.

The Court notes at the outset, however, that defendant's first argument in support of its motion for summary judgment is without merit. Defendant claims that although plaintiff filed the instant cause of action within the six-month statute of limitations period as set forth in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), plaintiff's failure to serve defendant with the summons

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and complaint within the six-month limitations period results in a bar to this suit. This Court disagrees. The Sixth Circuit recently addressed the issue in Macon v. Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985) finding that the six-month limitation upon hybrid 301/ fair representation suits borrowed from §10(b) of the National Labor Relations Act does not require that service of the complaint must be accomplished within the six-month period. Instead, such actions are governed by the filing and service requirements under the Federal Rules of Civil Procedure generally applicable to civil suits in the district courts. Accordingly, since plaintiff properly filed suit within the six-month limitations period, the failure to effect service within the six-month period does not act as a bar to plaintiff's suit.

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Defendant's next argument, however, is found to have merit. Although it is not entirely clear from the face of the complaint, the instant action appears to be brought against defendant Company for breach of the collective bargaining agreement. It is well settled that an employee seeking to recover from his employer and his union in an action under §301 of the LMRA, must establish both that the applicable collective bargaining agreement was violated and that his union failed to represent him properly. Hines v. Anchor Motor Freight, 424 U.S. 554, 570, (1976)

A breach of the duty of fair representation is found only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). Further, the allegations of the complaint must contain more than conclusory statements. Plaintiff must make a showing

that the action was improper. Balowski v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 372 F.2d 829 (6th Cir. 1967). Plaintiff's claim in this action falls far short of meeting this standard. The allegations regarding the Union's actions are contained in the complaint at ¶¶9-12. The plaintiff alleges that his membership in the Teamsters for a Democratic Union was brought out during the grievance procedure and as a result plaintiff was not represented by the union in a fair, loyal and good faith manner. The only support for these allegations are contained in plaintiff's answers to defendant's interrogatories and request to produce documents. Contained therein are plaintiff's conclusory and unsupported statements with regard to union actions. Upon an examination of the relevant paragraphs of the complaint as well as the remainder of the record,

the Court fails to find facts to support plaintiff's allegations that the union acted in a manner which was arbitrary, capricious or in bad faith.

In light of the Court's finding on this issue, it is unnecessary to address defendant's argument with regard to plaintiff's failure to exhaust internal union remedies. Plaintiff has failed to establish any genuine issue of material fact and it is, therefore

ORDERED that defendant Refiners Transport and Terminal Corporation's unopposed motion for summary judgment is granted.

FURTHER ORDERED that his cause is dismissed.

Nicholas J. Walinski (s)
SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio
March 26, 1986

APP. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CECIL G. HARRIS, * FILED: Sept. 5, 1986

Plaintiff, * No. C 84-7578

vs. * OPINION and ORDER

REFINERS TRANSPORT & TERMINAL CORP., et al., *

Defendant.

* * * * *

WALKINSKI, J.

Plaintiff originally brought this action pursuant to §301 of the Labor Management Act, 29 U.S.C. §185, and Title I, §202 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 et seq. Jurisdiction is based upon 18 U.S.C. §§1331, 1337, and on 29 U.S.C. §185. This action arose out of defendant Refiners Transport and Terminal Corp's discharge of the plaintiff and defendant Union's subsequent handling of the grievance

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instituted by the plaintiff. The defendant Company's motion for summary judgment was granted in this Court's opinion and order of March 26, 1984, on the basis that the plaintiff failed to show that the company, and the union, breached the collective bargaining agreement by acting in a manner which was arbitrary, capricious, or in bad faith as required by Hines v. Anchor Motor Freight, 424 U.S. 554, 570 (1976). The plaintiff did not respond to the motion. This Court found no genuine issue of material fact and accordingly, judgment was entered against the plaintiff on March 31, 1986.

The cause is now before the Court on a number of motions filed by the plaintiff. On April 11, 1986, the plaintiff filed a motion for a new trial under Rule 59, Fed. R. Civ. P., a motion to alter and amend judgment pursuant to Rule 59, Fed. R. Civ. P., and a motion to vacate the

judgment pursuant to the "inherent power of this Court to reconsider and vacate." On April 30, 1986 the plaintiff filed a motion for leave to amend his complaint and again moved the Court to vacate the judgment of March 31, 1986, pursuant to Rule 60(b), Fed. R. Civ. P. Each motion has been opposed by both defendants. The plaintiff has replied to a number of the defendants' oppositions. Further, a notice of appeal was filed by the plaintiff on April 30, 1986.

Upon a close review of the record this Court finds that there are four motions before the Court: (1) a motion for a new trial pursuant to Rule 59(a), Fed. R. Civ. P.; (2) a motion to alter and amend the judgment pursuant to Rule 59(e), Fed. R. Civ. P.; (3) a motion to vacate the March 31, 1986 judgment pursuant to Rule 60(b), Fed. R. Civ. P.; and (4) a motion for leave of Court to amend the

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complaint. Because of the multiple filings before the Court, each of the respective arguments from memoranda will be addressed in the order cited above without specific reference to a particular party's memoranda.

In his motion for a new trial and the motion to alter and/or amend the judgment, the plaintiff argues that; (1) he has a valid cause of action, and "he should be given a full opportunity to secure and present evidence;" (2) the defendant's motion for summary judgment lacked affidavits challenging the plaintiff's factual claims; (3) the plaintiff's counsel will work hard to pursue matters in an efficient manner, should he prevail at these proceedings; (4) the plaintiff's counsel was overburdened and failed to "advise the Court of additional steps desired to be taken in bringing to light the truth;" and (5) the application of the law to the actions of

the Union and Company are questions of fact to be resolved by the jury.

A motion for a new trial subsequent to a summary judgment motion is technically improper. 6 Pt. 2 J. Moore's Federal Practice ¶56.26 (2d. ed 1985); 25 Fed Proc, L Ed §743. However, it is generally accepted that a district court may review a summary judgment motion pursuant to Rule 59(e) and provide relief. 25 Fed Proc, L Ed §§769-71. Accordingly, this Court finds no merit in the motion for a new trial, but instead will address the merits of the motion to alter and amend the judgment, as the net relif requested is identical.

The Court finds no merit in plaintiff's first argument in favor of his motion to alter and amend that he should be given an opportunity to present this case to the Court. The plaintiff was adequately served with the motion for summary judgment, and at his request a sixty-day extension to

respond was granted by this Court. However, the plaintiff failed to respond at all. Only after this Court's ruling did the plaintiff come forward with a response. Accordingly, this Court is unpersuaded by this argument.

The plaintiff next argues that the judgment should be amended because the defendant did not present affidavits challenging the plaintiff's factual basis. Under Rule 56, Fed. R. Civ. P., there is no requirement that the moving party present affidavits attacking the opposing party's responsibility, under Rule 56(e), to demonstrate that summary judgment is improper by showing the existence of a material question of fact. The plaintiff failed to raise an issue of fact, and judgment was entered against him. Clearly, plaintiff's argument is misplaced here and not well taken by this Court. Similarly, plaintiff's contention, that the defendants'

actions, as they relate to the law, are questions of fact to be resolved by the jury is ill-founded. Plaintiff simply failed to raise any material issue of fact. Reasonable minds could come to but one conclusion, that no material issue of fact existed. This was clearly a situation where summary judgment was appropriate and plaintiff's contention is not persuasive.

Plaintiff's last two arguments in favor of his motion to amend: (1) to work efficiently; and (2) counsel's admitted failure to "advise" the Court of "events to be taken" are accepted as true and appreciated. However, such commitment and sincerity do not provide the Court with a basis an which to vacate on earlier ruling.

Having addressed each of plaintiff's arguments in favor of a motion to amend and/or alter a judgment and finding each without merit, the motion is denied.

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Plaintiff next moves this Court to vacate the judgment of March 31, 1986 pursuant to Rule 60(b), Fed. R. Civ. P.1

(Footnote P1 above reads:

"[1]The defendant union argues that this Court is without jurisdiction to consider a motion to vacate once a notice of appeal has been filed. Generally, a district court loses jurisdiction over a matter once the notice of appeal is filed. First Nat. Bank of Alsem Ohio v. Hirsch, 535 F.2d 343, 345 n.1 (1976). However, in First Nat. Bank of Salem, Ohio the Sixth Circuit clearly established that it is within the district court's discretion to consider and resolve a motion to vacate subsequent to the filing of notice to appeal. 535 F.2d at 345-46 (citing Herring v. Kennedy Hardware Co., 261 F.2d 202 (6th Cir. 1958)). Accordingly, this Court has jurisdiction over the present motion.")

"A motion to vacate judgment under Rule 60(b) is addressed to the sound discretion of the Court . . . ." Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957). The rule empowers the Court to relieve a party from a final judgment order or processing for any of six enumerated reasons. Plaintiff seeks relief pursuant to subsections (1) and (3) of the rule.

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Subsection of (1) of Rule 60(b) provides that the Court may relieve a party of a judgment because of "mistake, inadvertance, surprise or inexcusable neglect . . . " Plaintiff argues that he intended to file a response to the defendant's summary judgment motion but failed to do so "through oversight and failure to judge correctly (sic) when the Court would rule . . . ." This is an unacceptable argument. As discussed earlier, the plaintiff was given a sixty-day extension to file a response, yet a response was never filed. Further, the plaintiff has failed to come forward with an explanation for the "oversight" and without such an explanation this Court cannot find merit in the claim. Accordingly, the plaintiff has failed to establish any mistake or excusable neglect. See Kendall v. Hoover Co., 751 F.2d 171 (6th Cir. 1984).

Subsection (3) of Rule 60(b) provides

for relief from a judgment on a showing of "fraud, . . . misrepresentation, or other misconduct of an adverse party." Plaintiff claims that the defendant company concealed information regarding the plaintiff's dismissal from the Court. This Court cannot find any support, whatsoever in the record for this claim and therefore finds no instance of fraud misrepresentation or other wrongdoing.

Accordingly, after addressing each of plaintiff's arguments in support of a motion to vacate the judgment and finding each unsupportable, the motion is hereby denied.

Finally, the plaintiff motions this Court for leave to amend his complaint. The plaintiff argues that given Mr. Harris' affidavit along with "other documents" he makes out a prima facie case and should be allowed to file an amended complaint.

Plaintiff relies on Chapman & Dewey Lumber Co. v. United States, 359 F. 2d 495 (6th Cir. 1966), insupport of his claim. That case, however, is easily distinguishable from the present action. In Chapman, the Sixth Circuit Court of Appeals was impressed by the fact that an opposition to a summary judgment was not made possible because of the district court's actions and therefore allowed the non-moving party to remedy the defects. It was thought that the district court's apparent lack of formality of notice of oral argument and the close proximity of the notice to the trial was an indication that the motion was to be denied. 359 F.2d at 496. Here, however, there can be no such claim.

The plaintiff had an ample opportunity to oppose the motion, and this Court gave absolutely no indication that it would rule one way or the other. Further, in Chapman, the affidavits filed with the motion

presented "issues of material fact." That is not the case here. Even if the Court were to consider Mr. Harris' affidavit and the amended complaint, no issue of material fact would be presented. The amended complaint and the affidavit merely reasserts, vigorously, allegations were considered in a light most favorable to the plaintiff in ruling on the motion for summary judgment and found not to establish a genuine issue of material fact. Accordingly, leave to amend the plaintiff's complaint would not establish a prima facie case; plaintiff's argument is not well taken.

It is therefore,

ORDERED that plaintiff's motion for a new trial is denied.

FURTHER ORDERED that the plaintiff's motion to alter and/or amend the judgment is denied.

FURTHER ORDERED that the plaintiff's

motion to vacate the judgment is denied.

FURTHER ORDERED that the plaintiff's motion for leave to file an amended complaint is denied.

Nicholas J. Walinski(s)

SENIOR U.S. DISTRICT JUDGE

APP. P. 36

Toledo, Ohio
September 3, 1986

UNITED STATES DISTRICT COURT
NORTHERN DIST. OHIO, WESTERN DIVISION

Cecil G. Harris

v.

Refiners Transport & Terminal Corp., et al.

C 84-7578

JUDGE: NICHOLAS J. WALINSKI

FILED: Sept. 5, 1986

Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for new trial denied; plaintiff's motion to alter and/or amend judgment denied; plaintiff's motion to vacate judgment denied; plaintiff's motion for leave to file amended complaint denied.

Nicholas J. Walinski (s)
SENIOR U.S. DISTRICT JUDGE

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